No. 22,515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 566, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO. 42, AND SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Respondents.

Brief for Respondent Retail Clerks International Association, Local Union No. 899.

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TABLE OF AUTHORITIES CITED

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Brief for Respondent Retail Clerks International Association, Local Union No. 899.

JURISDICTION.

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec.

151, *et seq.*),[1] for enforcement of its order [R. 71; 33][2] issued against the respondents on July 23, 1967, and reported at 166 NLRB No. 92. This court has jurisdiction of the proceeding under Section 10(e), the alleged unfair labor practices having occurred at Arroyo Grande and San Luis Obispo, California.

STATEMENT OF THE CASE.

I.
The Board's Findings of Fact.

Briefly, the Board found that the respondent Unions violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a proscribed recognitional objective. The evidence upon which the Board based its findings is as follows:

A. The Picketing of the Company Stores.

State Mart, Inc., hereinafter referred to as the Company, is engaged in the operation of two retail food stores in Southern California, one in Arroyo Grande and the other in San Luis Obispo [R. 34; Tr. 67]. At no time pertinent to the issues involved herein were the employees at either store represented by a labor organziation [R. 35]. No election has ever been held to determine the employees' choice in regard to unionism; nor has any labor organization sought to obtain such an election (*Ibid.*).

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[1]The pertinent statutory provisions are set forth in Appendix B of the Board's Opening Brief.

[2]References designated "R." are to Volume I of the record as reproduced pursuant to rule 10 of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in Volume II of the record.

Respondent, Retail Clerks International Association, Local Union No. 899, hereinafter called Retail Clerks, and respondent, Amalgamated Meat Cutters and Butcher Workmen, Local Union No. 856, hereinafter called Meat Cutters, established picket lines at both stores with signs reading as follows [R. 35; Tr. 74]:

> "This market unfair because they do not pay the prevailing wage rates or benefits paid by other markets in the area. Members of Retail Clerks Local 899 and Meatcutters Local 556, AFL-CIO, protest the substandard wage rates paid in this market." [R. 35; Tr. 96, 127-128].

B. The February 1 Meeting.

On January 27, 1966, Company attorney Ted R. Frame telephoned Kenneth Schwartz, counsel for the Retail Clerks, in order to find out what could be done to bring about the removal of the picket line [R. 36; Tr. 13-14, 149]. In response to this inquiry, Schwartz stated that the picket lines would be lifted if the Company would adhere to the wages and working conditions prevailing in the area. The Union and Company representatives agreed to meet at a future date for the purpose of defining the precise nature of "area standards."

The meeting took place on Februry 1, 1966 [R. 37; Tr. 15, 151]. At the outset, Schwartz, acting as spokesman for the Retail Clerks and Meat Cutters, stated that the meeting was being held solely to advise the Company "what we meant by standards in this particular area" and that the Unions did not intend either to "ask for an organization" or to "negotiate an agreement" [R. 37; Tr. 152]. Schwartz proceeded to set

forth the Unions' definition of area standards, stating that such standards encompass not only wages but also "fringe benefits" and "other benefits," including health and welfare plans, pensions and vacations [R. 37; Tr. 153]. Schwartz emphasized that the Company "was to maintain the standards in the area, whatever the standards would be, and for whatever time the standards were in effect" [Tr. 177]. At this point, the Union representatives produced copies of the area bargaining agreements [R. 37; Tr. 20, 156-158] after striking therefrom certain clauses which would obviously not bear upon the question of area standards [R. 37-38; Tr. 158-160].

Schwartz further stated that in presenting the contracts *he did not "want it to be construed that [he was] making any demands* but [he wanted the Company] to know the *type of benefits* the employees enjoy under our agreement, *to explain the area standards*" [R. 37; Tr. 158; emphasis supplied.] When the Company representatives inquired as to the possibility of *modifying* certain of the area standards, the Unions stated that the meeting was not a negotiating session, that none of the benefits were subject to negotiation, and that the contracts spoke for themselves in regard to the definition of the benefits [R. 39; Tr. 18, 173].

At the conclusion of the meeting, the Company representatives stated that they would be unable to make an immediate decision in regard to the matter and the picketing continued. *At no time did any Company representative disagree with the Union definition of area standards.*

II.

The Board Conclusion and Order.

Upon the foregoing facts, the Board found that the respondent Unions had violated Section 8(b)(7)(C) of the Act by picketing the Company stores for more than thirty days without the filing of an election petition and with a proscribed recognitional objective. The Board issued an order requiring all respondent Unions to cease and desist from the unfair labor practices found and to post the appropriate notices [R. 71; 33].

ARGUMENT.

The Board Finding That the Respondent Unions Had a Proscribed Recognitional Objective and That Their Picketing Was Violative of Section 8(b)(7)(C) of the Act Is in Error Since Not Supported by Substantial Evidence.

A. Introduction.

Section 8(b)(7), enacted as part of the 1959 amendments to the Act, constitutes a comprehensive code governing recognitional and organizational picketing. Subsection (C) of Section 8(b)(7), which is involved herein, prohibits picketing by an uncertified Union where an object thereof is "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees," if such picketing has been conducted for more than thirty days without the filing of an election petition.

The sole issue before the Court is whether the Board properly found that the respondent Unions had a recognitional objective when they picketed the Company's stores.

B. Respondents' Sole Object in the Picketing Was the Preservation of Area Standards.

It is freely acknowledged by the Board that when a Union pickets an employer for the sole purpose of compelling compliance with prevailing area *wage and benefit* standards, the Board regards the picketing activity —so-called "area standards" picketing—as non-recognitional and outside the prohibition of Section 8(b)(7)-(C). *McLeod v. Chefs Cooks, Pastry Cooks & Assistants, Local 89 (Stork Restaurant),* 280 F. 2d 760 (C.A. 2d 1960). Prior to *Stork Restaurant,* as will appear, the Board took a contrary view.

As the Board has conceded in its Opening Brief, herein at page 2:

> "The respondent Unions have consistently described their picketing as motivated solely by such a permissible area standards object. Undeniably, the formal declarations of Union representatives and the legends of the picket signs were entirely consistent with this purported objection. Moreover, no direct demands for representative status were ever made and, in fact, on several occasions, the Unions expressly disclaimed all recognitional ambitions."

The Board, however, contends that the Unions engaged in "actual conduct [which] reflects an underlying or accompanying recognitional object." (Board Brief, p. 9). Such "actual conduct" was no more than the Union's specificity in reply when asked by the Company to define what the area standards were. It was the Company, not the Union, that sought to "bargain" concerning the standards and the Union's reply that the area standards were not subject to the negotiation.

We show below that the Union conditions to removal of the picket lines were solely in terms of maintaining area standards and were in no sense a request for recognition.

In *Calumet Contractors Assn.,* 133 NLRB 512 (1961), following *Stork Restaurant, supra,* the Board overruled its earlier view of area standards picketing and held, in effect, that a Union might lawfully picket for objects normally achieved through collective bargaining, *if the immediate object of the picketing was not recognition.* See *Fanelli Ford Sales Inc.,* 133

NLRB 1468; *Mission Valley Inn,* 140 NLRB 433; *Hod Carriers, Local 840 (Blinne Const. Co.),* 135 NLRB 1153.

The Board has held that picketing aimed at requiring unorganized employers to adopt the specific benefits contained in area contracts is permissible *area standards* picketing. *Local 741 Plumbers Union (Keith Riggs Plumbing),* 137 NLRB 1125. The Board anticipates our citing of *Keith Riggs* in its footnote 11 on page 11 of its Brief whereat it incorrectly assumes that we will cite *Keith Riggs* out of context. At page 1127 the majority in *Keith Riggs* states:

> "Our dissenting colleagues point to no evidence which would indicate *that respondent* [*union*] *was* insincere in its statements that it was not seeking *to negotiate with Riggs.* They merely assert, as they have elsewhere, [citing another case] that picketing to compel a change in wages and working conditions 'necessarily' is for the purpose of recognition and bargaining. *This is stated as virtually a proposition of law.* There is no judicial or legislative support for any such proposition. If Congress had intended to ban all picketing after thirty days, which is substantially what the dissenting view would accomplish, it could have achieved that objective in straight-forward and simple language. We hold, therefore, as did the Trial Examiner, that the picketing on the evidence in this case did not have for an object recognition or bargaining." (Emphasis supplied).

Here, as in *Keith Riggs,* the Union "has a legitimate interest apart from organization or recognition that [unorganized] employers meet prevailing pay scales

and employee benefits, for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards."

The Union interest in avoiding the undermining of area standards is two-fold:

1. The threat to Union standards is created not only "by unorganized employers who pay less for labor" by a "cost package" test, but by unorganized employers who fail to provide *specific* benefits for their employees.

2. Unions have a legitimate interest in maintaining specific wage *and* benefit levels in unorganized shops and plants *wholly apart from the affect of such standards on Union relations with organized employers.* Evidence of such altruistic interest is frequently seen, as for example, in the consistent support of Unions for minimum wage laws.

Here the record is utterly devoid of evidence of Union insincerity in its statement that it was not seeking to negotiate with the Company. It was the Company which approached the Union with the question of what it would take to call off the picket line. It was the Company which sought to bargain on "area standards." The Union did no more than define area standards according to its best understanding of the same *and in general terms.* At no time did the Company indicate its willingness to come even part way by paying the *wage part* of such standards. At no time *then or thereafter* did the Company make any attempt to meet area standards *according to any interpretation of what area standards were in fact*, nor did it at any time provide its own definition of area standards.

The meeting of February 1, 1966 was a setup planned by Frame. The Company had no intention then or thereafter of meeting area standards, but only an intention to place the Union in a position of appearing to commit an unfair labor practice. Frame's plan was to demand the Union definition of "area standards." If Schwartz were flexible, Frame would then charge the Union with bargaining; if Schwartz were inflexible, Frame would similarly charge the Union with bargaining (*i.e.,* demanding recognition) *which is exactly what Frame did two days following the February 1 meeting as the initial step in this proceeding.*

The Trial Examiner frankly acknowledged that the *only* evidence upon which a Section 8(b)(7)(C) finding a violation could rest was the "presenting an employer with a demand that it cannot reasonably meet and still stay in business, and placing this in a context where the most practical alternative is the adoption of a Union contract." Thus, the Trial Examiner reasoned that since the cost to the Company of complying with area standards would be either prohibitive, or would suggest to the Company that signing a contract would be a more practical alternative, that knowing all this tainted the Union demand for compliance with area standards as a bad faith demand.

In other words, a Union can request an employer to raise its wage rates and employee benefits to area levels only if it is practical and convenient for the employer to do so! The real sense of the Board decision is that in defining area standards in terms of actual benefits, a Union acts at its peril, in that *it will be found to have demanded recognition if the Employer finds it impractical to pay equivalent benefits.*

The Board insists on the testing of area standards by an "equivalent costs" test despite the fact that the Company never came up with equivalent costs, or indicated in any way its willingness to do so. It is submitted that whatever may be the proper test for area standards, that it is not the test of equivalent costs. The housewife who buys a pot roast in a market is interested in (and makes comparison to) the cost "to her," not in the wholesale cost to the store, concerning which cost she has no interest at all. Similarly, area standards are measured by the level of *received* wages and benefits and not by the cost of the same to the employer.[3] Whether or not the employer can afford to meet area standards can be of no consequence whatsoever with respect to the Union's right to peacefully picket in seeking compliance therewith.

The single issue presented in this case is well pointed up by the Board in its Brief at page 15 where it states:

> "We submit that where a Union is not content with *equalizing labor cost* but requires adoption of details identical with Union contracts, a recognitional objective is established, and no further showing need be made." (Emphasis supplied).

Thus, it is the contention of the Board that by its very nature the Union definition of area standards, *to include specific benefits as well as specific wages,* is a demand for recognition. In the Board's own words (in *Keith Riggs, supra*) such "is stated as virtually a proposition of law."

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[3]The term "area standards" is actually self definitive, *i.e.,* the wage rates and benefits being *received* in the area, not the cost to the Employers of providing the same.

As a proposition of law it is untenable. In the first place, it is unsound because of the context in which the Union demand arose. The Union, when asked what it meant by Union standards, quite naturally pointed to an area Union contract after striking the clauses which plainly involved recognition, bargaining or dealings with the Union.[4] In the second place, it is only "recognitional picketing" which may violate Section 8(b)(7)-(C) of the Act. In question here is the *purpose* of the picketing. The Board may not properly say, as it says here, whatever your purpose in fact, we find *as a matter of law,* a purpose of demanding recognition.

At page 16 of its Brief the Board makes this remarkable statement:

> "While the chief Union spokesman now testifies that he was not attempting to strike out all clauses which were not to be applicable to the Company, this fact was not communicated at the meeting and, indeed, no affirmative effort was ever made to make it clear to the Company that adherence to them was not required as the price for removing the pickets."

The short answer to this contention is that since the Company at no point ever intended to comply with area standards by *any* definition of the same, it was an academic question as far as the Company was concerned as to the exact specifics of area standards. The Company had served its purpose in obtaining an inflexible (non-bargaining) position from the Union and two days later it filed these charges based upon such position.

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[4]Had the Union been more specific than this in its "demands" Frame would certainly have argued that such specificity was in fact bargaining.

But it is crucial to note that the Union position, while inflexible *as to any bargaining,* was not inflexible *as to what the area standards might be in fact.* Frame never asked Schwartz to be more specific concerning or to reconsider what the area standards *were* or even to discuss the same; but only "are any of these things . . . negotiable?" [R. 36; Tr. 18]. Schwartz properly replied, "Nothing is negotiable [i.e., you must comply with the area standards]." (*Ibid.*)

The line between area standards and benefits which may be sought only as the result of recognition and bargaining is easy to draw. To the left lie wages and benefits payable directly to employees; to the right lie all provisions of an agreement which cover the relationships between Union and Employer.

Where, as here, there is no substantial evidence (indeed, no evidence at all) to indicate that the picketing was "recognitional" in character, such cases as *NLRB v. Carpenters Local 2133,* 356 F. 2d 464 (C.A. 9, 1966) relied upon by the Board (Board Brief, p. 9) are inapplicable.

Conclusion.

For the reasons stated, the Board's order should be denied enforcement.

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Dated: June 7th, 1968.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME SMITH